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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO VILLALOBOS,

Defendant and Appellant.

H033520

(Santa Clara County

Super. Ct. No. CC782252)

Defendant Armando Villalobos was convicted by jury trial of second degree murder (Pen. Code, § 187) and three counts of attempted murder (Pen. Code, §§ 187, 664, subd. (a)), and the jury found true allegations that he had personally used a knife in the commission of these offenses (Pen. Code, § 12022, subd. (b)(1)) and that he had personally inflicted great bodily injury (GBI) on the attempted murder victims (Pen. Code, § 12022.7, subd. (a)). He was committed to state prison to serve a term of 15 years to life consecutive to a determinate term of 12 years. On appeal, he contends that the jury's verdicts are not supported by substantial evidence and that the trial court prejudicially erred in instructing the jury with CALCRIM No. 600 on the "kill zone" theory. We conclude that substantial evidence supports the jury's verdicts and that the court did not prejudicially err in instructing the jury with CALCRIM No. 600.

I. Factual Background

In September 2007, 19-year-old Alejandra Granados was living in her parents' house in San Jose with defendant, their daughter, Alejandra's parents, Alejandra's sister Karla Hurtado, Karla's two children, Alejandra's grandmother, and a renter named Christian Reyes.¹ Defendant had moved in with the family more than a year earlier after Alejandra became pregnant with their daughter, but he left the house at Alejandra's request a couple of times and went to live with his mother for a while.

Defendant was a "macho man" who drank alcohol daily. When he had been drinking, he was aggressive, argumentative, and disrespectful. Defendant and Alejandra argued frequently, on an almost daily basis, and their arguments revolved around his drinking. Alejandra's mother, Marina Parra, did not like the way defendant controlled Alejandra, and she told him so. She felt his behavior was related to his drinking, and she disapproved of his drinking. Marina told him that Alejandra would eventually leave him if he did not treat her right. Defendant ignored her. Defendant also argued with Karla about his relationship with Alejandra. Karla too thought that defendant was overly controlling of Alejandra, and she had told defendant that he was "not right for" Alejandra.

In August 2007, defendant had stopped living at the house and gone to live with his mother. He subsequently came to Alejandra and asked her to let him move back in. She told him that he would have to stop drinking, be a good father to their daughter, treat her better, go to church, and ask her mother for permission to move back in. Alejandra emphasized that this was his last chance, and she agreed that they would go dancing once a month.

¹ Because some of the family members share a last name, we will refer to them by their first names for clarity.

Defendant reluctantly asked Marina to allow him to return. He promised that he would stop drinking, let Alejandra finish school, and treat her better. Marina told him he could return if he did as promised, but this was his last chance. Defendant moved back in with Alejandra's family at the beginning of September 2007. Although he did not drink in the house, he also did not join the family for meals. Defendant seemed "moody" and unhappy. He and Alejandra still argued, though not as much as before. Defendant did not go to church.

On the evening of Friday, September 28, 2007, defendant and Alejandra went out to a club in San Jose to see a band and dance. They left their daughter with Alejandra's father, Mariano Granados. Alejandra drove defendant's truck to defendant's mother's house where they picked up defendant's mother, her boyfriend, and another couple. At the club, the group ordered "buckets" of bottles of beer. Each bucket contained six bottles of beer. Defendant drank more than 10 bottles of beer. "He was drinking them like water." Defendant was going to the bathroom frequently and "being really rough, kind of sloppy." Alejandra was concerned that he was "doing something else." In fact, defendant was using cocaine.

They left the club when it closed, around 1:30 a.m. As they walked toward defendant's truck, defendant, who was drunk, wanted to get into a fight with a man who was standing by a car with a woman. Alejandra managed to get defendant to the truck without a fight occurring. Defendant was hungry, so Alejandra drove the group to a taco stand in Sunnyvale where they ate. Defendant was loud and aggressive. At the taco stand, defendant approached another man "as if he wanted to fight him as well." No fighting occurred. When they left the taco stand, Alejandra spoke with defendant's mother about his behavior. Alejandra did not want defendant to come home with her in his condition. She did not want her parents to see defendant drunk. Defendant's mother tried to convince defendant to stay at her home, but defendant refused. He did not want Alejandra to take his truck and leave him without a vehicle. After dropping off the other

two couples, Alejandra drove the two of them back to her house. On the way, defendant was “talking nonsense” and “trying to pick a fight” with Alejandra. He told her that there were other girls who wanted him if she did not want him.

When they arrived at Alejandra’s house, she parked the truck in the driveway, and the truck brushed against some bushes as she parked it. The truck was not damaged. Defendant did not like the way she had parked his truck, and he became “very upset” and “really loud[ly]” swore and accused Alejandra of “mess[ing] up his paint job.” Alejandra asked him to be quiet, but he continued to swear loudly and remained “pretty upset.” She was unable to calm him down, and she was concerned that her parents would wake up.

Alejandra knocked quietly on the front door of her parents’ home, and Karla opened the door. Alejandra asked Karla to move defendant’s truck. Defendant opposed this idea and wanted to move the truck himself. Alejandra did not want him to do that because of his drunkenness. While Karla was trying to reposition the truck, defendant was aggressively arguing with Alejandra. Defendant repeatedly asked for the keys to the truck so he could move it himself. Karla tried to move the truck, but it was too difficult so they left it as it was. Karla told defendant that it was only a matter of time before he and Alejandra broke up due to his behavior. She gave the keys back to Alejandra.

Karla, Alejandra, and defendant went inside the house. Defendant continued to ask for the keys to the truck. Alejandra argued with him, and so did Karla. Alejandra told defendant she did not want to be with him anymore due to his drinking, and it would be best for him to leave. He agreed. Alejandra borrowed Karla’s phone and called defendant’s mother. She told defendant’s mother that she “needed to come pick him up.” Alejandra did this because she did not want defendant to drive drunk.

While Alejandra was on the phone, defendant was arguing with Karla. Defendant made derogatory comments about Karla and her children. Karla called defendant a drunk, and she told him that he did not deserve Alejandra, who was too good for him. Karla said that she was glad that defendant and Alejandra were breaking up. Alejandra

told defendant to stop arguing with Karla, and defendant said “there you go, picking your family over [me] again.”

At some point, defendant briefly got his keys back. Alejandra realized this, and she tried to reclaim them from defendant’s pocket. They struggled over the keys, and Alejandra reclaimed them. Defendant remained “very upset,” and he kept asking for the keys to the truck.

Alejandra and defendant carried defendant’s clothing from her bedroom to an area near the front door, and defendant carried his clothing from there out to his truck. They removed nearly all of his belongings, and Alejandra said she would mail to him anything they had missed. Karla and defendant were not arguing during this period. Eventually, all of the arguing ceased, and it became quiet in the house.

Karla sat on her bed in the living room with her children. Alejandra went to her room to watch television while she waited for defendant’s mother to pick him up. Defendant went to Alejandra’s bedroom, swore, and said crude things in a mean way. In a soft voice, defendant said that she was the only person that he had ever really loved. He again asked for the keys, but Alejandra did not give them to him.

Defendant left Alejandra’s bedroom. He went outside the house for five or 10 minutes and then came back inside and went into the kitchen. He returned to Alejandra’s bedroom with an “evil” look about him that scared Alejandra. He said “you don’t know what you got yourself into.” She saw his hand move toward his pocket, and she noticed that the handle of a large kitchen knife was sticking out of his pants pocket. This knife was usually kept in a drawer in the kitchen.

Alejandra backed away from defendant and walked backward out of her bedroom down the hallway toward the living room. She called out to Karla that defendant had a knife, and she held her hand in front of her to ward off defendant. Defendant’s hand was on the knife in his pocket. Alejandra stopped when she got to the living room, where Karla was on her bed with her two children. Karla got up and came toward Alejandra.

Alejandra was scared and told Karla not to move. Karla and Alejandra started backing toward the area of the front door, with Alejandra behind Karla, and defendant walking toward them. Karla firmly told defendant “to leave, that she wasn’t scared of him, that she was going to call the police.” Alejandra told defendant she would give him his keys, and he should “just leave.” Defendant said nothing and just stared at them.

Defendant had his back against the front door. Marina opened her bedroom door and came out. Karla said to defendant “look, you woke her up.” As Karla was looking toward Marina, defendant began stabbing Karla in the upper chest, lower neck area. Alejandra moved toward defendant to try to stop him. Marina joined her in trying to push defendant away from Karla and out the door. Marina tried to hold defendant’s hands to stop him, but he turned toward her and started “cutting” her with the knife. Marina and defendant looked at each other. Marina slipped on the blood that was on the floor, and defendant cut her neck with the knife. Defendant kept stabbing at them, and he would not stop. Marina and Alejandra tried to push defendant away from them and out the front door of the house. Defendant continued to swing the knife at them, and he stabbed Alejandra. Somehow, they opened the front door, but they could not completely push defendant out. Defendant kept swinging the knife at them.

Karla called out to Mariano for help. The women managed to get most of defendant’s body out the door, but his hand was still inside stabbing with the knife and his foot was in the door keeping them from closing it. Mariano joined them and helped them. When Mariano joined them, defendant swung the knife sideways toward Mariano. With Mariano’s help, they were able to push defendant completely out the door and close the door. One of them locked the front door. Alejandra and Karla went and locked the rear sliding door to the house so that defendant could not enter the house through that door. Mariano fell down, and defendant began kicking the front door. At this point, “everybody was screaming.” They did not realize that Mariano had been fatally stabbed; Marina thought he had fainted, although Alejandra saw blood on him.

Reyes awoke to the sound of an argument among Alejandra, Karla, and defendant. He could hear Karla's voice and defendant's voice, but he could not tell what they were saying. It became quiet again, and Reyes fell back to sleep. He awoke again to hear Alejandra screaming. Reyes went into the living room, found Alejandra, Karla, and Marina bleeding, and he and Alejandra called 911. About a half hour had passed between the time Alejandra called defendant's mother and the time that 911 was called.

The police arrived very quickly.² Mariano was already dead. He had a stab wound to his right cheek, a cut on his forehead, five superficial cuts on his shoulder and chest, and a fatal stab wound to the base of his neck. The neck wound was four to six inches deep and had penetrated his lung and perforated a major blood vessel. His death was almost immediate after the neck wound, when his chest filled with blood and his lung collapsed. All three women had suffered serious but not life threatening stab wounds. Alejandra suffered a 1.5-centimeter stab wound to her head and a 5-centimeter long, deep stab wound to her arm. Marina had suffered stab wounds to her hand, wrist, upper back, and shoulder. The back and shoulder wounds were long and deep. Karla had more serious wounds. She had a stab wound in the area of her upper chest and neck that was 5 centimeters long, and two stab wounds to her shoulder and back.

Reyes told the police that defendant's mother lived in Sunnyvale, and he directed the police to defendant's mother's home. A minute after the police arrived at defendant's mother's house, defendant ran up to the house. Although he did not seem drunk, he was staggering, and looked tired and possibly intoxicated. As a police officer approached him to take him into custody, defendant said: "I'm the one, I'm the one who killed that guy."

After his arrest, defendant made numerous additional spontaneous statements, which were tape-recorded. "It's not their fault. It's mine. Fucking psycho, fucking had to do this shit. . . . I'm the one that did them homicides over there on King and McKee

² Defendant's mother did not arrive until after the police had arrived.

[Alejandra's parents' house]. All right? I'm being honest. . . . I have a daughter and I used to have a wife. All right? And I tried to kill 'em cause they pass the line. I don't know if they're alive, not or they passed the limit. . . . I don't know what you guys have to investigate. What, I did everything . . . we all went clubbing together. The next thing I know I was having bad attitude. . . . I'm the one that killed everybody or just fucking-I don't know what the fuck did I do over there. . . . I got mad and I started fucking getting a knife and I started fucking shanking everybody. . . . I'm only 18 and a killer." "They started acting up with me. I got mad. Got a knife. I started stabbing anybody that got in my way, that started going against me, except for my daughter. That's all I have to say. I don't know what, who, if and when- who did I stab? All I know I didn't stab my daughter. I didn't stab my fiancée. My mother-in-law, my father-in-law, but not my mother, not my daughter."

Later that day, defendant made additional taped statements to the police. He told the police that "I got mad" after Alejandra "scratched" his truck on some bushes when she parked it in the driveway in front of the house. Defendant said that he became angry because Alejandra would not let him park the truck since he was drunk. He recounted how Karla made critical comments about him, and Alejandra began throwing defendant's clothes "out." Defendant took his clothes and put them in his truck. Karla continued to make insulting comments to defendant. Karla's comments made defendant "[r]eally, really mad." Defendant asked Alejandra for his keys, but she would not give them to him. "But when I think I just exploded at her and I just got really upset that she wasn't taking my side and that when I think I stabbed her." "I don't know who I striked. I just got mad and striked at anybody that got close to me."

Defendant said he had a lot of resentment "[t]owards them, their family." When he was striking out with his knife, he was thinking: "That's what you get, bitch." "I did go towards Karla only, but other than that, whoever probably got in front." "It's a possibility [t]hat I could hit everybody." Defendant admitted that he "wouldn't have

stopped” stabbing and “would have continued, to kill [Karla]” if he had not been pushed out the door. Defendant said he felt a lot of anger and rage because Alejandra would not “take my side, instead of taking her family’s side.”

Defendant admitted “I like to fight,” and he explained that he had tried to get into a fight at the taco stand. His desire to fight arose because “I have so much anger inside.” Defendant said he had consumed “about twenty-four [Coronas] probably” over a period of four or five hours. This was a “normal” amount for him to drink, and he was “coherent” and “calm” after drinking this much. Defendant claimed that he did not “feel the effects” of 24 beers.

A blood sample taken from defendant at 6:55 a.m. that morning revealed that he had metabolized cocaine in his blood and a blood alcohol level of .15. The knife that defendant had used to stab Mariano and the others was found a couple of hundred feet from Alejandra’s parents’ house. The knife was “severely bent” and had a broken tip. It had not been in this condition before defendant used it as a stabbing instrument.

II. Procedural Background

Defendant was charged by information with murder (Pen. Code, § 187) and three counts of attempted murder (Pen. Code, §§ 187, 664, subd. (a)). It was further alleged that he had personally used a knife in the commission of these offenses (Pen. Code, § 12022, subd. (b)(1)), that he had acted willfully, deliberately, and with premeditation (Pen. Code, §§ 187, 189, 664) in committing the attempted murders, and that he had personally inflicted GBI on the attempted murder victims (Pen. Code, § 12022.7, subd. (a)).

At trial, the prosecution sought to prove that defendant had committed first degree murder and attempted murders with premeditation. Defendant asserted that he had committed manslaughter, rather than murder. He conceded that he had intended to kill Karla, but he argued that, because Karla had provoked him by trying to end his

relationship with Alejandra, his crime was attempted voluntary manslaughter rather than attempted murder. As to Marina and Alejandra, defendant contended that he had committed no more than uncharged assaults with a deadly weapon, rather than attempted murders, and pointed out that the jury could not convict him of any assault offenses.³

After the prosecution had presented its case-in-chief, defendant made a Penal Code section 1118.1 motion with respect to the premeditation allegations and the attempted murder counts involving Alejandra and Marina. His trial counsel asserted that there was insufficient evidence that defendant had intended to kill Alejandra and Marina. The prosecutor conceded that there was insufficient evidence to support the premeditation allegation as to the attempted murder count involving Marina. The court granted the motion as to the premeditation allegation attached to the attempted murder count involving Marina, and it denied the motion in all other respects.

A toxicologist testified for the defense at trial that defendant's blood alcohol level at the time of the stabbings would have been approximately .21. On cross-examination, the defense toxicologist testified that the effects of cocaine last for no more than 30 minutes.

The jury was instructed on voluntary manslaughter as a lesser included offense of the murder count and on attempted voluntary manslaughter as a lesser included offense of the attempted murder counts. The prosecutor argued to the jury that defendant had admitted his intent to kill when he told the police "I tried to kill 'em cause they pass the line."

The jury deliberated for more than two full days. The jury found defendant guilty of second degree murder and found the personal use allegation true as to that count. The

³ Defendant's trial counsel argued: "Unfortunately, the way this case is charged for Marina and Alejandra, what happened, what the law is, what Armando did is assaulted them with a deadly weapon and inflicted great bodily injury, there's no doubt about that. Unfortunately, that's not an option for you."

jury also found defendant guilty of all three attempted murder counts and found the personal use and GBI allegations true, but it found not true the premeditation allegations.

Defendant was committed to state prison to serve a term of 15 years to life consecutive to a determinate term of 12 years. The 15 years to life term was imposed for the murder count, and a one-year term was imposed for the personal use allegation. The attempted murder count involving Karla was selected as the principal term, and a term of seven years was imposed for that count. A one-year personal use enhancement and a three-year GBI enhancement were added to that term. Concurrent 11-year terms were imposed for the other two attempted murder counts. Defendant filed a timely notice of appeal.

III. Discussion

A. Sufficiency of the Evidence

1. Malice

Defendant contends that the jury's verdicts on the murder count and the attempted murder count involving Karla are not supported by substantial evidence of malice because there was "overwhelming evidence of provocation/heat of passion that no reasonable trier of fact could have ignored." He maintains that the jury could not have concluded that he was guilty of anything more than voluntary manslaughter and attempted voluntary manslaughter.

"[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576 (*Johnson*), quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) "[The] appellate court must view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425; accord *People v.*

Pensinger (1991) 52 Cal.3d 1210, 1237.) “ “[I]t is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt.” ” (*People v. Abilez* (2007) 41 Cal.4th 472, 504.)

“The test is whether the evidence supports conviction, not whether it would support innocence. [Citation.] Sufficiency of provocation and whether a defendant in fact acted under such provocation are questions of fact for the jury.” (*People v. Roy* (1971) 18 Cal.App.3d 537, 552, disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 32.) “ [T]he factor which distinguishes the “heat of passion” form of [attempted or completed] voluntary manslaughter from murder is provocation. The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim.” (*People v. Manriquez* (2005) 37 Cal.4th 547, 583.) “The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.] “Heat of passion arises when ‘at the time of the killing [or attempted killing], the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.’ ” [Citation.] ” (*Id.* at pp. 583-584.) “The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively.” (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) “ “[N]o defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.” (*Id.* at pp. 1252-1253.)

At its core, defendant's contention is that the jury was *required to conclude* that he was provoked to a heat of passion by Karla's statements and that a reasonable person would have been provoked to a heat of passion by those statements. The record simply does not support this contention as to either the subjective or objective component of heat of passion.

We must view the evidence in the light most favorable to the jury's verdicts. (*Johnson, supra*, 26 Cal.3d at p. 576.) The jury could have concluded that defendant was very angry and physically confrontational long before Karla made any statements to him that morning. Twice earlier that morning, defendant had tried to get into fights with men he happened to encounter. Neither incident was provoked. Defendant tried to pick a fight with Alejandra as she drove him back to her parents' house. There was no apparent provocation for his conduct. Upon their arrival, he became even more enraged because he was displeased at how Alejandra had parked his truck. Reasonable jurors could have concluded that no reasonable person would have become enraged over such a minor event.

Defendant continued to aggressively argue with Alejandra while Karla was trying to reposition the truck. It was only at this point that Karla first said anything to defendant about his relationship with Alejandra. Defendant thereafter argued with both women, and Alejandra swiftly announced that he needed to leave. Alejandra's announcement did not provoke defendant to violence. Instead, he agreed to her request. While Alejandra called defendant's mother to ask her to pick up defendant, defendant argued with Karla, and they exchanged unpleasant remarks. But after this phone call was completed, he ceased arguing with Karla and began moving his possessions out of the house. Reasonable jurors could have concluded that his argument with Karla had little impact on defendant.

When defendant's belongings had been removed from the house, there was no further arguing between defendant and Karla, and defendant appeared solely concerned with Alejandra. It was at this point that defendant fetched the knife and approached

Alejandra, not Karla, with it. Karla's only further actions were placing her body between defendant and Alejandra to protect Alejandra from the knife and telling defendant "to leave, that she wasn't scared of him, that she was going to call the police." Rational jurors could have concluded that a reasonable person would not act rashly simply because another person sought to protect her sibling from a knife-wielding man.

These facts were more than sufficient to justify a rational jury's conclusion that Karla's statements did not actually provoke defendant's rage and that Karla's statements would not have provoked a reasonable person under the circumstances. When Karla first made statements to defendant that morning, defendant was already filled with rage and a desire for violence and had been indiscriminately directing his rage at other people. The sequence of events reflected that defendant had been seeking a target for his rage, and Karla was simply unlucky enough to come within his range. The jury could have reasonably concluded that his actions were not a reaction to Karla's statements but the culmination of his alcohol-fueled desire for violence. A reasonable trier of fact could have concluded that Karla's brief verbal remarks to defendant did not cause his rage and therefore did not amount to provocation. It follows that the jury's verdicts on the murder count and on the attempted murder count involving Karla were supported by substantial evidence.

2. Intent to Kill

Defendant claims that the jury's attempted murder verdicts on the counts involving Alejandra and Marina are not supported by substantial evidence of defendant's intent to kill.

Again, the evidence must be view in the light most favorable to the jury's verdicts. (*Johnson, supra*, 26 Cal.3d at p. 576.) While there was conflicting evidence regarding defendant's intent to kill Alejandra and Marina, the jury could have found evidence of defendant's intent to kill in his statements to police shortly after his arrest. "And *I tried to kill 'em* cause they pass the line. . . . I'm the one *that killed everybody* . . . I started

fucking *shanking everybody*.” (Italics added.) “I started stabbing anybody that got in my way, that started going against me, except for my daughter.” Defendant also disclaimed any intent to kill Alejandra, but the jury could have found that his disclaimer was untrue, while his admission was true. As to Marina, the circumstances of her stabbing were indicative of an intent to kill. Defendant looked directly at Marina before stabbing her in a vital area of her body.

Since defendant admitted that he had intended to kill those he had stabbed, the jury could have concluded that he harbored the intent to kill when he stabbed Alejandra in the head and arm and Marina in the shoulder and back.

B. “Kill Zone” Paragraph In CALCRIM No. 600

Defendant contends that the “kill zone” paragraph in the version of CALCRIM No. 600 given to the jury by the trial court misled the jury regarding the specific intent element of attempted murder.

1. Background

The prosecution asked the court to instruct the jury with CALCRIM No. 600. This requested instruction included the following language: “A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or ‘kill zone.’ In order to convict the defendant of the attempted murder of Alejandra Granados and Marina Parra, the People must prove that the defendant not only intended to kill Karla Hurtado but also either intended to kill Alejandra Granados and Marina Parra, or intended to kill anyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Alejandra Granados and Marina Parra or intended to kill Karla Hurtado by harming everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Alejandra Granados and Marina Parra.”

The defense asked the court to give a modified version of CALCRIM No. 600 that, among other things, did not include the “kill zone” paragraph. Defendant’s trial counsel argued that the “kill zone” language was “pejorative” and “not necessary.” He noted that he could find no case in which the “kill zone” instruction had been given where the case involved a knife attack. Defendant’s trial counsel asked the court to either give the modified instruction, give the standard instruction but exclude the “kill zone” paragraph, or modify the “kill zone” paragraph. He objected to the standard instruction on state and federal due process grounds, and he claimed that it would deny defendant his right to a fair trial. The court denied defendant’s trial counsel’s request.

The trial court orally instructed the jury: “To prove that the defendant is guilty of attempted murder, the People must prove that, one, the defendant took a direct but ineffective step toward killing another person. And two, the defendant intended to kill that person. [¶] A direct step requires more than merely planning or preparing to commit murder or gaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning and preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of a crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstances outside the plan had not interrupted the attempt. [¶] A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or kill zone. In order to convict the defendant of the attempted did [*sic*] murder of Alejandra Granados and Marina Parra, the People must prove that the defendant not only intended to kill Karla Hurtado but also either intended to kill Alejandra Granados and Marina Parra or intended to kill anyone within the kill zone. [¶] If you have a reasonable doubt whether the defendant intended to kill Alejandra Granados and Marina Parra or intended to kill Karla Hurtado by harming

anyone in the kill zone, then you must find defendant not guilty of the attempted murder of Alejandra Granados and Marina Parra.”

In her opening argument, the prosecutor made but a single brief mention of the “kill zone” instruction. “Much like that instruction, everyone who was in the zone of harm, yes, he intends to kill. But separate and apart from that, I have evidence of his intention to try to kill all three of them.”

2. Analysis

Defendant claims there were several problems with the “kill zone” portion of the instruction given by the trial court.⁴ First, he asserts that the instruction was deficient because it “failed to inform the jury that Alejandra and her mother must have been within the kill zone for Appellant’s concurrent intent to include them.” He maintains that the instruction permitted the jury to find intent to kill “even if they were outside the kill zone provided it found he intended to kill Karla and anyone else who was actually within that zone” Second, he contends that the instruction erroneously permitted the jury to find that “merely being within the kill zone would allow an inference of the specific intent to kill.” Third, defendant argues that the instruction erroneously failed to “define the limits or parameters of the ‘kill zone’ and is therefore ambiguous.” Fourth, defendant suggests that the instruction’s use of the term “kill zone” was “inappropriate” because that term is “emotionally laden” and “improperly argumentative” resulting in prejudice to defendant.

⁴ Two additional problems with the version of CALCRIM No. 600 given by the trial court have been identified by the California Supreme Court. The instruction referred to “anybody” rather than “everybody” and to “harm” rather than “kill.” (*People v. Stone* (2009) 46 Cal.4th 131, 138, fn. 3 (*Stone*).) Defendant does not contend here that the instruction was prejudicially erroneous in either of these respects. In *People v. Campos* (2007) 156 Cal.App.4th 1228 (*Campos*), the court concluded that the everyone/anyone ambiguity in the instruction was not likely to mislead the jury. (*Campos*, at p. 1243.) CALCRIM No. 600 has since been revised to correct both of these problems.

When a criminal defendant contends that a jury instruction was erroneous, we inquire “‘whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the Constitution.” (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, quoting *Boyde v. California* (1990) 494 U.S. 370, 380 (*Boyde*).) We evaluate the challenged instruction in the context of all the instructions given by the trial court. (*Boyde*, at p. 378.) We will find error only if it is reasonably likely that the jury instructions as a whole provided the jury with an inaccurate understanding of the applicable law. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526.)

The “kill zone” portion of CALCRIM No. 600 is solely concerned with the intent to kill element of attempted murder. “To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant’s mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others.” (*People v. Bland* (2002) 28 Cal.4th 313, 328 (*Bland*).) Nevertheless, a defendant “may be convicted of multiple counts of attempted murder on a ‘kill zone’ theory where the evidence establishes that the [defendant] used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the ‘kill zone’) as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the [defendant] intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm.” (*People v. Smith* (2005) 37 Cal.4th 733, 745-746; *Bland*, at pp. 329-331.) “This concurrent intent theory is not a legal doctrine requiring special jury instructions, as is the doctrine of transferred intent. Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill

a specific target does not rule out a concurrent intent to kill others.”⁵ (*Bland*, at p. 331, fn. 6.)

Defendant faults the instruction for failing to explicitly require the jury to find that Alejandra and Marina were within the “kill zone.” He maintains that, due to this omission, the jury could have premised an intent to kill finding on the “kill zone” theory without finding that Alejandra and Marina were within the “kill zone.” The totality of the instruction made it inconceivable that the jury could have concluded that the “kill zone” theory could be applied to persons who were not within the “kill zone.” The first sentence of the “kill zone” paragraph made it clear that the required intent to kill could be directed at “a specific victim or victims” and also at those persons “*in* a particular zone of harm or kill zone.” (Bold italics added.) Because this portion of the instruction explicitly required that these persons be “in” the “kill zone,” it is not reasonably likely that the jury could have concluded that a finding under the “kill zone” theory could be applied to persons who were outside the “kill zone.”

Defendant argues that the instruction erroneously allowed the jury to find an intent to kill based on a person’s mere presence within the “kill zone.” The instruction explicitly required that, in order to utilize the “kill zone” theory, the prosecution had to prove that defendant “intended to kill anyone within the kill zone.” Since the instruction required proof that defendant *intended to kill* those persons “within the kill zone,” it did not fail to require the necessary intent to kill finding.

⁵ Notwithstanding the California Supreme Court’s statement in *Bland* that jury instructions were not required on the “kill zone” theory, *Bland* led to the promulgation of standardized instructions on the “kill zone” theory. (*Stone, supra*, 46 Cal.4th at p. 137.) CALCRIM No. 600 is the current standardized instruction that includes a passage regarding the “kill zone” theory. The bench notes to CALCRIM No. 600 reflect *Bland*’s statement that such instructions are not required and state that the “kill zone” language “is provided for the court to use at its discretion.”

Defendant's claim that the instruction was erroneous in failing to adequately define "kill zone" lacks merit. It was obvious from the instruction that "kill zone" referred to the area into which defendant unleashed lethal force. No reasonable likelihood exists that the jury would not have understood what "kill zone" meant.

Finally, we reject defendant's contention that the term "kill zone" is an inappropriately argumentative term. This contention was rejected in *Campos*. (*Campos*, *supra*, 156 Cal.App.4th at p. 1244.) Defendant claims that *Campos* is wrong. We disagree. As the court in *Campos* found, the use of this term in the instruction does not invite the jury to draw an inference unfavorable to defendant. (*Ibid.*) The jury was merely given the option of considering whether a "kill zone" had been created; it was not instructed that a "kill zone" had been created.

In sum, we find no error because any inadequacies in the version of CALCRIM No. 600 given by the trial court were not reasonably likely to mislead the jury regarding the applicable law.

IV. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Duffy, J.